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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20665

In Matter of	)	
	)	
MCI TELECOMMUNICATIONS, INC.	)	
CORPORATION, INC.	)	
	)	
Petition for Declaratory Ruling	)	CC Docket No. 97-100
Preempting Arkansas Telecommunications	)	
Reform Act of 1997	)	

TO: The Commission

OPPOSITION OF
NORTHERN ARKANSAS TELEPHONE COMPANY

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Filed: July 7, 1997

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SUMMARY

Northern Arkansas Telephone Company (NATCO) opposes MCI Telecommunications Corporation, Inc.'s (MCI) June 3, 1997 request for a declaratory ruling preempting various provisions of the Arkansas Telecommunications Reform Act of 1997 (Arkansas Act) and the Arkansas Public Service Commission's (Arkansas PSC) jurisdiction over Section 252 arbitrations. MCI's request should be denied for several reasons.

First, the Commission should dismiss MCI's June 3, 1997 request, because it is nothing more than a late-filed comment and does not present any justification for failure to meet the deadlines established in the April 3, 1997 Public Notice (Pleading Cycle Established For Comments On ACSI Petition For Declaratory Ruling Regarding Preemption In Arkansas), DA 97-652, released April 3, 1997. There the Commission invited comment on a similar preemption petition filed by American Communications Services, Inc. (ACSI) with May 5, 1997 and May 20, 1997 as the comments and reply comment dates. The Commission should declare that the interests of administrative efficiency and finality require that all arguments regarding preemption of the Arkansas Act and Arkansas PSC be made by the presently scheduled July 7, 1997 and July 22, 1997 deadlines, so that the record can be closed and a single Commission order prepared to address the matter.

Second, the Tenth Amendment to the Constitution and Section 2 of the Communications Act of 1934, as amended (Act), give Arkansas substantial discretion in the exercise of its sovereignty over intrastate communications. Arkansas has elected to exercise this discretion to enact and implement a statute (the Arkansas Act) which is consistent with the 1996 Federal Act. However, the controlling Tenth Amendment case law indicates that neither the Congress nor the Commission have the authority to compel Arkansas to do so.

Third, Congress and federal agencies, acting within the scope of congressionally-delegated agencies, may preempt state regulation only under the limited circumstances which are expressed by Congress in a "clear statement." Under the Telecommunications Act of 1996

(1996 Act), The Commission's authority to preempt state or local requirements is limited to situations where such requirements actually or effectively prohibit entry into interstate or intrastate telecommunications markets. With respect to interconnection and universal service matters, the 1996 Act contains no "clear statement" of Congressional intent to preempt or displace state authority. Rather it gives the states broad and generally exclusive jurisdiction over interconnection and universal service matters.

Fourth, the 1996 Act gives the Commission no rulemaking, participation or oversight responsibilities regarding the state inquiries and determinations regarding the exemption of rural telephone companies from Section 251(c) obligations of incumbent local exchange carriers (LECs). In addition, the Arkansas Act does not conflict in any manner with the rural exemption in Section 251(f)(1) of the Act.

Fifth, the Arkansas Universal Service Fund (AUSF) does not conflict with Section 254 or any other provision of the 1996 Act. There is no requirement in Section 254(f) or elsewhere that state universal service mechanisms employ forward looking cost methodologies. Likewise there is no requirement in Section 254(f) or elsewhere that states eliminate "hidden subsidies." MCI's request for Commission preemption of the AUSF must therefore be denied.

Sixth, the Arkansas legislature has lawfully and reasonably determined that designation of a single ETC in rural telephone company study areas is the most reliable and effective way to preserve and advance federal and state universal service goals under the prevailing economic conditions in rural Arkansas. Its determination is a wholly consistent and reasonable exercise of the discretion explicitly afforded to it in Section 214(e)(2), and is therefore not subject to Commission preemption.

Seventh, if a state makes any attempt to approve or disapprove a negotiated interconnection agreement, Section 252(e)(6) expressly strips the Commission of jurisdiction to review the state's decision, and instead places such jurisdiction in the federal district courts. In that event, the Commission has no jurisdiction to review the Arkansas PSC order, and may

not intrude indirectly by preempting the state proceeding.

Eighth, MCI's assertion that Arkansas must require incumbent LECs to reduce their wholesale rates by the full amount of the costs avoided by not selling directly to retail customers, but prohibit them from recovering direct costs they incur in selling to resellers, is as inane as it is unfair. Nothing in Section 252(d)(3) indicates that Congress intended to require ILECs to subsidize MCI and other resellers in this manner, or that Arkansas and other states have been stripped of their discretion to refuse to implement such an inequitable rate regulation within their jurisdictions. Also, nothing in Section 252(d)(3) requires states to impose wholesale pricing requirements upon promotional prices, service packages, trial offerings, or temporary discounts offered by ILECs. Likewise, nothing in Section 252(d)(3) authorizes the Commission to adopt rules in this area, or to require the states to implement or enforce such rules.

Finally, the Commissions should reject MCI's assertion that the Arkansas Act requires the Commission to preempt and supplant the Arkansas PSC in arbitration and agreement approval proceedings because the Arkansas PSC cannot impose requirements **above and beyond** those contained in the 1996 Federal Act and the Commission's implementing rules. This "above and beyond" theory misses the essential point that there must be a real and substantial **conflict** between state and federal requirements before the extraordinary step of Commission preemption is warranted. Likewise, it disregards the equally significant fact that the Commission is precluded from acting "above and beyond" the provisions of the Communications Act and its own rules.

Like ACSI and other prior commenters, MCI has not shown any material conflict warranting Commission invasion of the sovereignty of the State of Arkansas and/or preemption of the Arkansas Act or Arkansas PSC. Rather, the Arkansas Act, which was adopted by a virtually unanimous vote of the Arkansas legislature, expressly and repeatedly attempts to achieve consistency with the 1996 Federal Act. MCI's preemption request should therefore be

denied on judicial, statutory and Constitutional grounds.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
MCI TELECOMMUNICATIONS CORPORATION, INC.	)	CC Docket No. 97-100
	)	
Petition for Declaratory Ruling Preempting Arkansas Telecommunications Reform Act of 1997	)	

TO: The Commission

OPPOSITION OF NORTHERN ARKANSAS TELEPHONE COMPANY

Northern Arkansas Telephone Company (NATCO), by its attorneys, opposes MCI Telecommunications Corporation, Inc.'s (MCI's) June 3, 1997 request for a declaratory ruling preempting various provisions of the Arkansas Telecommunications Reform Act of 1997 (Arkansas Act) and the Arkansas Public Service Commission's (Arkansas PSC's) jurisdiction over Section 252 arbitrations.

Background

The Arkansas Act was passed by overwhelming margins in the Democrat-controlled General Assembly, and was signed into law by Governor Mike Huckabee, a Republican. The vote in the Arkansas Senate was thirty-two (32) "for" and only one (1) "opposed"; while the vote in the Arkansas House of Representatives was ninety-two (92) "for" and only three (3) "opposed." In other words, a greater than 96 percent, bipartisan majority of Arkansas' duly-elected legislators, as well as its Governor, supported the Arkansas Act.

The lobbying efforts of MCI and its allies convinced less than four percent of the General Assembly to oppose the Arkansas Act, and failed to persuade Governor Huckabee to veto it. Now, MCI wants the Commission to disregard the will of the people of Arkansas and their elected representatives, and to block by fiat the implementation of legislation which MCI

could not persuade the Arkansas legislature to reject or modify.

In their May 5, 1997 comments and May 20, 1997 reply comments herein, NATCO and others have shown that the requested Commission preemption of both a state statute and a state commission would grossly violate Arkansas' state sovereignty, particularly in light of the absence of any material **conflict** between the Arkansas Act and the Telecommunications Act of 1996 (Federal Act). Rather, Section 2 of the Arkansas Act expressly states that it is designed -- in a manner "consistent with the Federal Act" -- to open telecommunications markets to competition, reduce unnecessary regulation and advance universal service, while recognizing the unique circumstances of high-cost rural areas and the small carriers which serve them. Indeed, the substantive portions of the Arkansas Act are replete with express mandates that the Arkansas PSC act consistently and in conformity with the "Federal Act."

MCI's Pleading Is Untimely And Unfair

In its Public Notice (Pleading Cycle Established For Comments On ACSI Petition For Declaratory Ruling Regarding Preemption In Arkansas), DA 97-652, released April 3, 1997, the Commission invited comment on a similar preemption petition by American Communications Services, Inc. (ACSI), and set May 5, 1997 and May 20, 1997 as the deadlines for comments and reply comments.

MCI had actual knowledge of the Public Notice and submitted brief comments on May 5, 1997. However, MCI elected not to support the ACSI petition, or to present its alternative arguments at that time. Rather, the thrust of MCI's "comments" was to inform the Commission and interested parties that it unilaterally was setting its own procedural schedule and would file its own preemption request at a later date.

MCI could have, and should have, submitted the materials in its present request on or before the May 5, 1997 comment deadline. That would have permitted interested parties to review and address all related Arkansas preemption issues by the May 20, 1997 reply deadline,

and would have enabled the Commission to conduct an efficient and orderly proceeding. MCI's disregard for the Commission's procedural schedules has required NATCO and others to expend substantial additional time and resources to revisit matters which should have been dealt with during the previous comment and reply comment periods.

The Commission should dismiss MCI's June 3, 1997 request, because it is nothing more than a late-filed comment and does not present any justification for failure to meet the deadlines established in the April 3, 1997 Public Notice. If (for any reason) the Commission accepts and considers the MCI filing, it should expressly declare that it will not permit others further to prolong this proceeding by filing additional requests for preemption. Rather, the Commission should declare that the interests of administrative efficiency and finality require that all arguments regarding preemption of the Arkansas Act and Arkansas PSC be made prior to the presently scheduled July 7, 1997 and July 22, 1997 deadlines, so that the record can be closed and a single Commission order prepared to address the matter.

Dual Sovereignty Under The Tenth Amendment

As the Supreme Court has recently stated, the Constitution established a system of "dual sovereignty" under which the states surrendered certain powers to the federal government but retained "a residuary and inviolable sovereignty." Printz v. U.S., Case No. 95-1478, issued June 27, 1997 (Slip Opinion at 7). The Tenth Amendment to the Constitution declares that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Communications Act of 1934, as amended (the Act), has always recognized this dual sovereignty in telecommunications matters. Section 2 limits the scope of federal regulation and the Commission's authority to interstate and foreign communications, 47 U.S.C. §152(a), and strictly proscribes the Commission's authority over intrastate communication service, 47 U.S.C. §152(b). This fundamental jurisdictional provision was not changed or eliminated by

the 1996 Federal Act.

The Supreme Court has clearly and consistently recognized dual sovereignty, and has held that the federal government may not compel the states to enact or implement, by legislation or executive action, federal regulatory programs. In New York v. United States, 505 U.S. 144 (1992), the Court held that a state may not constitutionally be required by Congress to enact particular legislation or to implement a particular administrative solution. In Printz v. U.S., supra at 13, the Court reiterated this prohibition, and held that it may not be circumvented by compelling state officers to execute federal laws. The majority opinion in Printz stated:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Slip Opinion at 13.

Hence, the Tenth Amendment and Section 2 of the Act give Arkansas substantial discretion in the exercise of its sovereignty over intrastate communications. Whereas Arkansas has elected to exercise this discretion to enact and implement a statute (the Arkansas Act) which is consistent with the 1996 Federal Act, the controlling New York and Printz cases indicate that neither the Congress nor the Commission have the authority to compel Arkansas to do so.

Preemption Standards

In a system of dual sovereignty, preemption of a state statute by a federal administrative agency is an extremely grave matter. The Supreme Court has repeatedly indicated that federal preemption of state law is a drastic step which should be taken only where Congress has provided a "clear statement" of its intent to displace state authority. Gregory v. Ashcroft, 501 U.S. 452, 464 (1991); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717 (1985).

In Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69 (1986), the

Supreme Court stated that Congress and federal agencies acting within the scope of congressionally-delegated authority may preempt state regulation only under the following limited circumstances:

(a) where Congress, in enacting a federal statute, expresses a clear intent to preempt state law, Jones v. Rath Packing Co., 430 U.S. 519 (1977);

(b) when there is outright or actual conflict between federal and state law, Free v. Bland, 369 U.S. 663 (1962);

(c) where compliance with both federal and state law is, in effect, physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963);

(d) where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983);

(e) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); and

(f) where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, Hines v. Davidowitz, 312 U.S. 52 (1941).

The 1996 Federal Act does not change the well-established interstate/intrastate jurisdictional boundaries set forth in Section 2 of the Act. It expressly authorizes the Commission to preempt state and local statutes and legal requirements in only one limited instance -- where they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253(a). At the same time, Congress stated that nothing in Section 253(a) shall affect the ability of a state or local government to impose, on a competitively neutral basis and consistent with the Federal Act's universal service provision, "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. §253(b). Read together, these provisions indicate that the Commission's authority to preempt state or local requirements is limited to situations where such requirements actually or effectively

prohibit entry into interstate or intrastate telecommunications markets.

MCI wants the Commission also to preempt state and local regulations which permit entry, but make it more expensive. However, the Commission has no authority to do this, for Congress limited its "clear statement" of the Commission's Section 253 preemption authority to "prohibitions" and "effective prohibitions."

With respect to interconnection and universal service matters, the 1996 Federal Act contains no "clear statement" of Congressional intent to preempt or displace state authority. Rather, it gives the states broad and generally exclusive jurisdiction over interconnection and universal service matters. For example:

1. Section 251(f)(1) gives only states the authority to determine whether exemptions of rural telephone companies from the interconnection obligations of incumbent local exchange carriers (ILECs) should be continued or terminated;

2. Section 251(f)(2) gives only states the authority to consider petitions by small telephone companies for suspension and modification of the interconnection obligations of ILECs and other local exchange carriers (LECs);

3. Section 214(e)(2) gives only states the authority to designate "eligible telecommunications carriers (ETCs)" for universal service purposes.

4. Section 252(a)(2) gives only states the authority to participate in the negotiation and mediation of interconnection agreements;

5. Section 252(b) gives only states the authority to arbitrate interconnection agreements;

6. Section 252(d) gives only states the authority to determine whether rates for interconnection and unbundled network elements are just and reasonable;

7. Section 252(d)(3) gives only the states the authority to determine wholesale rates for resold services; and

8. Section 253(e) gives only states the authority to approve or reject negotiated and arbitrated interconnection agreements.

Section 252(e)(5) permits Commission involvement in state interconnection proceedings **only** when the state wholly fails to act. If a state moves to issue any sort of decision approving or disapproving a negotiated interconnection agreement, Section 252(e)(6) expressly strips the

Commission of jurisdiction to review the state decision, and places such jurisdiction in the federal district courts instead.

Under these circumstances, Congress has not given the Commission clear authority to preempt the states in interconnection and universal service matters. On the contrary, the Commission has no basis for preemption because: (a) Congress has not expressed a clear intent to preempt state law; (b) there is no outright or actual conflict between federal and state law; (c) compliance with both federal and state law is possible; (d) there is no implicit or explicit barrier in the Federal Act to state regulation; (e) Congress has not occupied the entire field of regulation and has left substantial room for the states to supplement federal law; and (f) state law is not an obstacle to the accomplishment and execution of the full objectives of Congress.

Rural Telephone Company Exemption
From Incumbent Local Exchange Carrier Obligations

Section 251(f)(1) of the Act expressly authorizes state commissions to conduct inquiries regarding exemption of rural telephone companies from the Section 251(c) obligations of ILECs, and to determine in individual cases whether such exemptions should be continued or terminated. The provision gives state commissions 120 days to act upon requests for termination of exemptions, and sets forth three general criteria to be employed by state commissions -- namely, that termination of the exemption be not unduly economically burdensome, be technically feasible and be consistent with universal service -- in making their determinations. Section 251(f)(1) makes no mention of, and sets no requirements for, the procedures and burdens of proof to be employed by the state during such inquiries. Likewise, it gives the Commission no rulemaking, participation or oversight responsibilities regarding the state inquiries and determinations. The sole Section 251(f)(1) reference to the Commission is the Commission regulations."

Section 10 of the Arkansas Act does not conflict in any manner with Section 251(f)(1).

It merely: (a) specifies the burden of proof ("clear and convincing evidence") that must be met before the Arkansas PSC will terminate a rural telephone company exemption; (b) lists ten factors to be considered by the Arkansas PSC in its evaluation of the universal service criterion; and (c) clarifies the default outcome when the Arkansas PSC does not complete its inquiry within the 120-day period.

Section 10 of the Arkansas Act does not prohibit (or have the effect of prohibiting) MCI or any other entity from entering any market served by any Arkansas rural telephone company. If a Section 251(f)(1) exemption is continued pursuant to an Arkansas PSC determination, it does not relieve the subject Arkansas rural telephone company of its obligations to furnish interconnection under Section 251(a), or to provide resale opportunities, dialing parity, and rights-of-way under Section 251(b). Such exemption merely prevents MCI and other competitors from forcing the Arkansas rural telephone company to give them the highly-favorable rates and terms for interconnection, unbundled elements, resale and collocation contemplated by Section 251(c). Hence, continuation of the Section 251(f)(1) exemption will not constitute a barrier to entry by MCI and others into markets served by rural telephone companies. In the absence of an effective prohibition of entry, the Commission's limited Section 253 preemption power is neither relevant nor applicable.

Section 10 of the Arkansas Act constitutes a wholly reasonable and lawful exercise of the State's sovereign and Congressionally-recognized authority to determine whether Arkansas rural telephone companies will be exempt from certain ILEC responsibilities. It is also a reasonable and lawful exercise of the State's sovereign and Congressionally-recognized responsibilities to preserve and advance universal service and to safeguard the rights of Arkansas consumers.

The Commission itself has noted that the Section 251(f)(1) exemption is needed "because Congress recognized that it might be unfair to both the carriers and the subscribers they serve to impose all of Section 251's requirements upon rural companies." Report And Order (Federal-

State Joint Board on Universal Service), CC Docket No. 96-45, released May 8, 1997, at para. 295 ("USF Order"). Moreover, the Commission has admitted that determinations whether rural telephone companies are entitled to continuation of this exemption "generally should be left to state commissions." First Report And Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), CC Docket No. 96-98, released August 8, 1996, at para. 1253 ("Local Competition Order").

MCI asserts that the burden of proof established in Sections 10(b) and (c) of the Arkansas Act conflicts with the burden of proof set forth in the Local Competition Order. However, Section 251(f)(1) gave sole authority for exemption inquiries and determinations to the states, and gave the Commission no rulemaking, oversight or appellate authority over such proceedings. The Commission itself purported to make only "interpretations" of certain aspects of Section 251(f) because "it appears that many parties welcome some guidance from the Commission." Local Competition Order at para. 1254. Such "interpretations" do not warrant preemption of the state determinations and proceedings that are expressly authorized by Section 251(f)(1).

Arkansas Universal Service Fund

Section 254(f) of the Act expressly authorizes states to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." It further permits states to "adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden the Federal universal service support mechanisms."

The legislative history of the 1996 Federal Act states that Section 254(f) specifically preserves state authority with respect to universal service. It declares that a state "may adopt any measure with respect to universal service that is not inconsistent with the Commission's

rules." Conference Report (H. Rept. 104-458) at p. 132. The legislative history focuses primarily upon consistency with respect to equitable and nondiscriminatory contributions by all providers of intrastate telecommunications services, and otherwise allows states to adopt additional universal service requirements so long as they "do not rely upon or burden Federal universal service support mechanisms." Id.

The Commission has recognized explicitly that Section 254(f) permits separate state mechanisms, noting:

> . . . the legislative history indicates that states may continue to have jurisdiction over implementing universal service mechanisms for intrastate services supplemental to the federal mechanisms so long as "the level of universal service provided by each state meets the minimum definition of universal service established [under Section 254] and a State does not take any action inconsistent with the obligation of all telecommunications carriers to contribute to the preservation and advancement of universal service" established under Section 254 (footnote omitted). USF Order at para. 819.

Section 4 of the Arkansas Act establishes a separate and supplemental Arkansas Universal Service Fund (AUSF). This mechanism: (a) provides support for basic local exchange services consistent with the core services designated by the Joint Board and the Commission, Section 4(a); (b) is funded by equitable and nondiscriminatory contributions by all providers of intrastate telecommunications services, Section 4(b); and (c) is wholly separate from, and will not burden, the federal mechanism. Therefore, the AUSF constitutes a lawful and reasonable exercise of Arkansas sovereignty and of the rights recognized in Section 254(f). It does not conflict with Section 254 or any other provision of the 1996 Federal Act.

Contrary to MCI's assertions, there is no requirement in Section 254(f) or elsewhere that state universal service mechanisms employ forward looking cost methodologies. Likewise, there is no requirement in Section 254(f) or elsewhere that states eliminate "hidden subsidies." Indeed, the Commission has expressly stated that it "does not have any authority over the local rate setting process or the implicit intrastate universal service support reflected in intrastate rates." USF Order at para. 271. MCI's request for Commission preemption of the AUSF

must therefore be denied.

Eligible Telecommunications Carrier

Section 214(e)(2) expressly assigns to state commissions the task of designating ETCs for purposes of distribution of federal universal service support. It states that "the State commission **may**, in the case of an area served by a rural telephone company, and **shall**, in the case of all other areas, designate more than one common carrier as an [ETC] for a service area designated by the State commission [emphasis added]."

The Commission has expressly recognized that states have "discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company." USF Order at para. 135. It has further noted that there is no prohibition against "State adoption of a second set of eligibility criteria for a state universal service mechanism." Id. at para. 136 and n.329.

Section 5(d) of the Arkansas Act is wholly consistent with the discretion afforded to states to designate only one ETC in rural telephone company service areas for federal and/or state universal service purposes. It states that "[f]or the entire area served by a rural telephone company, . . . there shall be only one [ETC] which shall be the incumbent local exchange carrier that is a rural telephone company."

The Arkansas legislature has lawfully and reasonably deter-mined that designation of a single ETC in rural telephone company study areas is the most reliable and effective way to preserve and advance federal and state universal service goals under the prevailing economic conditions in rural Arkansas. Its determination is a wholly consistent and reasonable exercise of the discretion explicitly afforded to it in Section 214(e)(2), and is therefore not subject to Commission preemption.

Review Of Negotiated Agreements

Section 252(e) of the 1996 Federal Act gives state commissions the sole authority to approve or reject negotiated and arbitrated interconnection agreements. Section 252(e)(5) permits Commission involvement in state interconnection proceedings **only** when the state wholly fails to act. If a state makes any attempt to approve or disapprove a negotiated interconnection agreement, Section 252(e)(6) expressly strips the Commission of jurisdiction to review the state's decision, and places such jurisdiction in the federal district courts instead.

Section 9(i) of the Arkansas Act requires the Arkansas PSC to approve any negotiated interconnection agreement unless it is shown by clear and convincing evidence that the agreement does not meet the minimum requirements of Section 251 of the Federal Act. And once the Arkansas PSC approves or disapproves such agreement, Section 252(e)(6) allows only the federal courts to review its order. In that event, the Commission has no jurisdiction to review the Arkansas PSC order, and may not intrude indirectly by preempting the state proceeding.

Wholesale Pricing For Resale

Section 252(d)(3) of the 1996 Federal Act expressly authorizes state commissions to "determine wholesale rates [for Section 251(c)(4) resale purposes] on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

Section 9(g) of the Arkansas Act defines the wholesale rate for Section 251(c)(4) resale as the "retail rate of the service less any net avoided costs due to the resale." This definition constitutes a wholly reasonable and lawful exercise of the State's jurisdiction over the setting of wholesale rates, and is fully consistent with Section 252(d)(3).

MCI's assertion that Arkansas must require ILECs to reduce their wholesale rates by the

full amount of the costs avoided by not selling directly to retail customers, but prohibit them from recovering any additional costs they incur in selling to resellers, is as inane as it is unfair. Nothing in Section 252(d)(3) indicates that Congress intended to require ILECs to subsidize MCI and other resellers in this manner, or that Arkansas and other states have been stripped of their discretion to refuse to implement such an inequitable rate regulation within their jurisdictions.

Also, nothing in Section 252(d)(3) requires states to impose wholesale pricing requirements upon promotional prices, service packages, trial offerings, or temporary discounts offered by ILECs. Likewise, nothing in Section 252(d)(3) authorizes the Commission to adopt rules in this area, or to require the states to implement or enforce such rules.

Section 9(d) of the Arkansas Act constitutes a reasonable and lawful exercise of the State's discretion to decline to require wholesale pricing for promotional prices, service packages, trial offerings, or temporary discounts offered by ILECs. There is no conflict between this provision and Section 252(d)(3), and therefore no basis for Commission preemption of the Arkansas provision.

Arkansas PSC Authority Over Arbitrations

Section 9(d) of the Arkansas Act also states that, "[e]xcept to the extent required by the Federal Act and this Act," the Arkansas PSC shall not require an incumbent LEC "to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements" to a competing LEC. MCI raises the same argument as ACSI that this and similar provisions require the Commission to preempt and supplant the Arkansas PSC in arbitration and agreement approval proceedings because the Arkansas PSC cannot impose requirements **above and beyond** those contained in the 1996 Federal Act and the Commission's implementing rules.

As detailed in NATCO's earlier comments and reply comments, this "above and

beyond" theory misses the essential point that there must be a real and substantial **conflict** between state and federal requirements before the extraordinary step of Commission preemption is warranted. Louisiana Public Service Commission v. FCC, supra. Likewise, it disregards the equally significant fact that the Commission is precluded from acting "above and beyond" the provisions of the Communications Act and its own rules. See U.S. v. Nixon, 418 U.S. 683, 695-96 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957) (an agency is bound by its own rules, and may depart from them only by amending them).

Conclusion

Like ACSI and other prior commenters, MCI has not shown any material conflict warranting Commission invasion of the sovereignty of the State of Arkansas and/or preemption of the Arkansas Act or Arkansas PSC. Rather, the Arkansas Act, which was adopted by a virtually unanimous vote of the Arkansas legislature, expressly and repeatedly attempts to achieve consistency with the 1996 Federal Act. MCI's preemption request should therefore be denied on judicial, statutory and Constitutional grounds.

Respectfully submitted,
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By _____
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Dated: July 7, 1997

CERTIFICATE OF SERVICE

I, Cheryl R. Pannell, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 7th day of July, 1997, I caused to be delivered by hand or by U. S. Mail, a copy of the foregoing "OPPOSITION OF NORTHERN ARKANSAS TELEPHONE COMPANY" to the following:

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